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## Ching Suet Yeen v Lee Hock Teong

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-721–04 OF 2021
NANTHA BALAN, AZIMAH OMAR AND CHOO KAH SING JJCA
21 AUGUST 2023

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*Family Law — Appeal — Divorce petition — Application for rehearing — Decree nisi and decree nisi absolute order granted in the absence of appellant — Whether there was appealable error to warrant an appellate interference — Divorce and Matrimonial Proceedings Rules 1980 rr 44, 50(5) — Law Reform (Marriage and Divorce) Act 1976 ss 61(2)(b) & 103*

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The appellant appealed against the decision of the High Court which dismissed her application ('encl 75') for a rehearing of the divorce petition under r 44 of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980') which had been disposed of on 24 June 2019. She also applied to rescind and set aside the decree nisi and decree nisi absolute under r 50(5) of the DMPR 1980, s 53 of the Law Reform (Marriage And Divorce) Act 1976 ('the LRA') and s 61(2)(b) of the LRA and an injunction under s 103 of the LRA. The appellant was not present in court for the hearing on 24 June 2019 on which the High Court made an order for divorce, maintenance and access rights of her children. However, she had lodged an appeal to the Court of Appeal against the said order on which she thereafter withdrew and was accordingly struck out. She also filed encl 42 to set aside the order nisi/absolute in the High Court. Encl 42 was also withdrawn. Then, the appellant filed encl 75 on 9 December 2019 to rehear the divorce petition. Hence, the issue raised was whether there was appealable error to warrant an appellate interference.

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**Held**, dismissing the appeal:

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(1) The appellant submitted that the lawyer who appeared on her behalf, had no authority to withdraw encl 42. The court was of the view that if she had any issue with the conduct of her previous lawyer, then that had to be taken up separately as her remedy lies elsewhere. Thus, there was no appealable error to warrant any appellate interference in this case (see paras 7–8).

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(2) The appellant had lodged an appeal to the Court of Appeal on which she withdrew and which resulted in the appeal being struck out. Enclosure 75 was clearly a non-starter. In the result, there was no merits in this appeal. The appeal was therefore dismissed (see paras 9–10).

**[Bahasa Malaysia summary**

Perayu telah merayu terhadap keputusan Mahkamah Tinggi yang menolak permohonannya ('lampiran 75') untuk pendengaran semula petisyen perceraian di bawah k 44 Kaedah-Kaedah Prosiding Perceraian dan Hal Ehwal Suami Isteri 1980 ('PPHESI 1980') yang telah dilupuskan pada 24 Jun 2019. Beliau juga memohon untuk membatalkan dan mengetepikan dekri nisi dan dekri nisi mutlak di bawah k 50(5) PPHESI 1980, s 53 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('MUPP') dan s 61(2)(b) MUPP dan satu injunksi di bawah s 103 MUPP. Perayu tidak hadir di mahkamah untuk pendengaran pada 24 Jun 2019 di mana Mahkamah Tinggi membuat perintah untuk perceraian, nafkah dan hak akses anak-anaknya. Bagaimanapun, beliau telah membuat rayuan kepada Mahkamah Rayuan terhadap perintah tersebut yang mana beliau kemudiannya menarik balik dan dengan itu telah dibatalkan. Beliau juga memfailkan lampiran 42 untuk mengetepikan perintah nisi/mutlak di Mahkamah Tinggi. Lampiran 42 juga telah ditarik balik. Kemudian, perayu memfailkan lampiran 75 pada 9 Disember 2019 untuk mendengar semula petisyen perceraian. Oleh itu, isu yang dibangkitkan adalah sama ada terdapat kekhilafan boleh dirayu untuk menjamin campur tangan rayuan.

**Diputuskan**, menolak rayuan:

(1) Perayu berhujah bahawa peguam yang hadir bagi pihaknya, tidak mempunyai kuasa untuk menarik balik lampiran 42. Mahkamah berpendapat bahawa jika dia mempunyai apa-apa isu dengan kelakuan peguamnya terdahulu, maka perkara itu perlu diambil kira secara berasingan kerana remedinya terletak di tempat lain. Oleh itu, tiada kekhilafan boleh dirayu untuk menjamin sebarang campur tangan rayuan dalam kes ini (lihat perenggan 7–8).

(2) Perayu telah mengemukakan rayuan kepada Mahkamah Rayuan di mana beliau telah menarik balik dan yang menyebabkan rayuan itu dibatalkan. Lampiran 75 jelas bukan permulaan. Hasilnya, tiada merit dalam rayuan ini. Oleh itu rayuan ditolak (lihat perenggan 9–10).]

**Cases referred to**

*Lee Hock Teong v Ching Suet Yeen* [2021] MLJU 1097; [2021] 1 LNS 900, HC (refd)

**Legislation referred to**

Divorce and Matrimonial Proceedings Rules 1980 rr 44, 50(5)
Law Reform (Marriage and Divorce) Act 1976 ss 53, 61(2)(b), 103

**Appeal from**: *Lee Hock Teong v Ching Suet Yeen* [2019] MLJU 1576 (High Court, Shah Alam)

*The appellant acted in person.*
*R Mageswaran (with Sujata a/p Mohanadas) (M Sujata & Assoc) for the respondent.*

**Nantha Balan JCA:**

**[1]** This is an appeal by Ms Ching Suet Yeen ('appellant') against the decision of the High Court dated 6 March 2020 which dismissed her application via encl 75 which was for a rehearing of the divorce petition under r 44 of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980') which had been disposed of on 24 June 2019 and to rescind and set aside the decree nisi and decree nisi absolute under r 50(5) of the DMPR 1980, s 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') and s 61(2)(b) of the LRA; and (iii) for an injunction under s 103 of the LRA. The appellant was absent at the hearing before the High Court on 24 June 2019. The order made by the High Court at Shah Alam on 24 June 2019 in open court reads as follows:

(i) perkahwinan antara Pempetisyen dan Responden yang didaftarkan melalui Daftar Perkahwinan No. A534500 pada 6.10.2001 dibubarkan;

(ii) Dekri Nisi dijadikan mutlak dengan serta merta;

(iii) Hakpemeliharaan, jagaan dan kawalan ('care, custody and control') sertapenjagaan ('guardianship') Lee Jun Lin diberikan kepada Pempetisyen;

(iv) Responden diberikan hak akses penuh kepada Lee Jun Lin;

(v) Responden berpindah keluar dengan aman damai dari rumah beralamat No. 115-A, Jalan 1/7, Taman Villa Height 2, 43000 Kajang, Selangor dalam tempoh tujuh (7) hari dari tarikh Dekri Nisi diperintahkan oleh Mahkamah yang Mulia ini;

(vi) segala perbelanjaan anak tersebut termasukpendidikan hingga ke peringkat tertinggi, perubatan dan harian sehingga mencapai umur dewasa ditanggung oleh Pempetisyen;

(vii) Responden memulangkan kepada Pempetisyen kereta No Pendaftaran: WEV1125 yang sedang digunakan oleh Responden yang didaftarkan atas nama Pempetisyen;

(viii) Responden memindahmilik saham yang dipegang dalam Pembinaan Yoke Ling Sdn Bhd ke atas nama Pempetisyen dengan serta-merta;

(ix) Status quo hartanah-hartanah tersebut iaitu sebuah banglo 2 tingkat yang beralamat di No 115-A, Jalan 1/7, Taman Villa Height 2, 43000 Kajang, Selangor dan sebuah apartment beralamat di LG-06, Apartment Minang Ria 2, Jalan Minang Ria 1, Taman Minang Ria 2, 43200 Batu 9 Cheras, Selangor dikekalkan seperti sedia kala;

(x) kos tindakan ini ditanggung oleh Pempetisyen;

(xi) tiada nafkah dibayar oleh Pempetisyen kepada Responden.

DAN AKHIRNYA DIPERINTAHKAN bahawa pihak-pihak menanggung kos peguamcara masing-masing.

**[2]** The appellant had previously lodged an appeal to the Court of Appeal via notice of appeal dated 26 August 2019 and the appeal was against the High Court's order dated 24 June 2019. The appeal was registered as B-02(A)-1629–08 of 2019. On 2 March 2021, the appeal was called up at the Court of Appeal in open court. The appellant was present in the Court of Appeal and was unrepresented. According the minutes of the Court of Appeal, the appellant had 'withdrawn the appeal' and thereupon the Court of Appeal struck out the said appeal.

**[3]** In the meanwhile, back in the High Court, the appellant had filed encl 42 (on 22 August 2019), which was also to set aside the order dated 24 June 2019. Enclosure 42 was withdrawn on 28 November 2019. The High Court's minutes show that one Mohd appeared as counsel for the appellant.

**[4]** Then the appellant filed encl 75 on 9 December 2019. In encl 75, the appellant had sought to obtain the following reliefs:

(a) a rehearing of the divorce petition under r 44 of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980') that this court disposed on 24 June 2019;

(b) to rescind and set aside the decree nisi and decree nisi absolute under r 50(5) of the DMPR 1980, s 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') and s 61(2)(b) of the LRA; and

(c) for an injunction under s 103 of the LRA.

**[5]** Enclosure 75 was dismissed by the High Court on 6 March 2020. See: *Lee Hock Teong v Ching Suet Yeen* [2021] MLJU 1097; [2021] 1 LNS 900 (HC). The High Court's findings and reasons for dismissing encl 75 are as follows:

FINDINGS OF THIS COURT

[10] PH had raised a preliminary objection to RW's application and prayed that it be dismissed because the applications filed by RW are defective and failed to follow the statutory format, and ought to be dismissed in limine. I am guided by O 1A of the RC 2012 that in administering these Rules, the court or a judge shall consider the overriding interest of justice and not merely the technical non-compliance with these Rules.

It must not allow procedural irregularity to affect the case's and I also considered that RW is a layperson who was unrepresented in this proceeding, and latitude

needs to be given in the circumstances. In *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213; [2013] 3 CLJ 47 (CA), the Court of Appeal upheld the workings of O 1A of the RC 2012.

I find no evidence of any disadvantage or prejudice caused to PH because of this incompliance in the present application. I dismissed the preliminary objection and proceeded to consider the merits of RW's application.

(i) For the divorce petition that was decided on 26 June 2019 to be set aside and rehearing under r 44 of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980')

[11] On the trial date 24 June 2019, the learned counsel informed me that they had duly informed RW of the trial day. I found that since papers were in order, PH was ready to proceed with the trial, and RW had failed to be present without giving any reasonable excuse/explanation; the said trial proceeded with PH giving evidence and closing his case on the same day as following O 35 r 1(2) of the RC 2012. Upon perusing all the evidence adduced, relevant cause papers, and brief submission by the learned counsel, I found that PH had succeeded in proving his case on a balance of probabilities. Therefore, I allowed his claim against RW with no order as to costs. Dissatisfied with my decision (refer *Lee Hock Teong v Ching Suet Yeen* [2019] MLJU 1576; [2019] 1 LNS 1976; [2019] AMEJ 1612):

(a) RW filed an appeal to the Court of Appeal;

(b) however, from the minutes available on CMS2, I observed that RW had withdrawn the said appeal, and the appeal was struck out by the Court of Appeal on 2 March 2021;

(c) thereby rendering finality to the decision of this court on 26 June 2019, and the question of setting aside the said order can no longer arise in the circumstances;

(d) O 42 r 7(1) and (2) of the RC 2012 provides that a judgment or order takes effect from the date on which it is pronounced. It is my considered view that RW cannot come back to this court by invoking r 44 of the DMPR 1980 to set aside the said order dated 26 June 2019 (saved it is premised on illegality, fraud, misrepresentation, or lack of jurisdiction) because the order is now final and permanent;

(e) in *Lee Gee Pheng v RHB Bank Bhd* [2004] 1 MLJ 618; [2003] 4 CLJ 639; [2003] 6 AMR 698, Nik Hashim JCA summarised the law on this aspect, where he said:

It is worthy of note that once an order of court has been drawn up and perfected, as in this case, it cannot be altered, varied or set aside as the court is functus officio. The proper recourse for a party dissatisfied with the order is to appeal against it. However, this general principle is subject to certain established exceptions which allow the court to set aside or amend a final order. A final order may be set aside or amended without the need to appeal in the following cases:

(i) to correct errors in expressions of the intention of the court (the slip rule) pursuant to O 20 r 11 of the RHC;

(ii) where the order is made in the absence of a party at the hearing: O 28 r 4(1); O 32 r 6; O 35 r 2 of the RHC;

(iii) where the order has been obtained in breach of natural justice: *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374; [1996] 2 CLJ 586 (refd);

(iv) where the order contravenes a substantive statutory provision rendering it defective on grounds of illegality or lack of jurisdiction; and

(v) where the justice of the case requires the court to correct a serious defect in the order: *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 (refd); *Selvam Holdings (M) Sdn Bhd v Grand Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners)* [2000] 3 MLJ 201; [2000] 3 CLJ 16 (refd).

In the circumstances of the present case, I find RW has failed provide any grounds, justifications, premise, or merits upon which this court may exercise its judicial discretion to revisit the order of decree nisi and decree nisi absolute dated 3 July 2019. Being a regular judgment, she requires an affidavit of merits, which in this case, she has none (refer *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd*).

(ii) To rescind and set aside the decree nisi and decree nisi absolute dated 3 July 2019 under r 50(5) of the DMPR 1980, s 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') and s 61(2)(b) of the LRA; and

[12] RW seeks to set aside the said decree nisi/decree nisi absolute based on the provision of s 61(2)(b) of the LRA, which provides:

> ... that where a decree nisi of divorce has been granted, and no application for it to be made absolute has been made by the party to whom it was granted, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court, and on that application, the court may rescind the decree nisi.

Evidently, s 61(2)(b) of the LRA is only applicable when there is no application for the decree nisi to be made absolute by the party to whom it was granted. From the facts of the case:

(a) this court granted PH the decree nisi on 26 June 2019, and he applied for the said decree nisi to be made absolute immediately;

(b) a certificate of making decree nisi absolute was issued by this court on 3 July 2019 (encl 37);

(c) in the circumstances, therefore, s 61(2)(b) of the LRA is not applicable in the present case; and

(d) since the decree nisi had already been made absolute, this court is functus officio.

Similarly, with my earlier two findings, this application by RW is devoid of merits

and deserves no further consideration from this court.

[13] In addition, there is no provision in the LRA for rescinding or setting aside a decree nisi that had already been made absolute. It is the legislator's intention when the LRA was framed to ensure the integrity and finality of a decree nisi that had become absolute. Parties are not allowed to freely apply to have it rescinded or set aside save and except in very exceptional cases or circumstances (see *Wong Cheng Ping v Chin Guan Seng @ Tan Guan Seng* [2010] MLJU 226; [2009] 1 LNS 1627; [2010] 5 AMR 171).

(iii) For an injunction under s 103 of the LRA.

[14] The court shall have power after the grant of a decree or divorce to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation. Injunctions are generally granted under this section where the infliction of physical and mental injury and threats thereof are concerned (see *Chan Ah Moi v Phang Wai Ann*; *Lee Sook Kwan v Yap Woon Woi* [2010] MLJU 2215; [2010] 1 LNS 1362).

However, I find RW has failed to provide essential particulars and specify the instances that PH was harassing her. Therefore, I have no hesitation in dismissing this application for an injunction for want of evidence.

CONCLUSION

[15] In light of the foregoing and after closely scrutinizing the application and examining all evidence adduced before me, I dismissed RW's application (encl 75) with an overall cost of RM2,000 granted to PH.

## OUR DECISION

**[6]** In so far as the appeal before us is concerned, we take the view that the appellant has had her day in court. Although the appellant was not present in court on 24 June 2019, she had nevertheless lodged an appeal to the Court of Appeal which she thereafter withdrew and was accordingly struck out. She also filed encl 42 to set aside the order nisi/absolute. Enclosure 42 was also withdrawn.

**[7]** However, the appellant maintains that the lawyer who appeared on her behalf, had no authority to withdraw encl 42. We are of the view that if she had any issue with the conduct of her previous lawyer, then that has to be taken up separately as her remedy lies elsewhere.

**[8]** Having considered the matter carefully, and having due regard to the comprehensive written submissions and the extensive oral clarification before us, we find that there is no appealable error to warrant any appellate interference in this case. In our view the learned judge, having considered all the evidence, was fully entitled to reach her evaluative judgement as per the grounds of judgment.

**[9]** Although the appellant criticised the judge's approach and reasoning, we are not persuaded that the judge's approach was erroneous, the reasoning flawed or the conclusions wrong. We agree with the judge that upon the decree nisi being made absolute, the order is not capable of being rescinded. And the court become *functus officio.*

**[10]** Yet further, the appellant had lodged an appeal to the Court of Appeal, which she withdrew and which resulted in the appeal being struck out. Clearly, encl 75 was clearly, a non-starter. In the result, we find no merits at all in this appeal. The appeal is therefore dismissed. We exercised our discretion and made no order as to costs.

*Appeal dismissed.*

Reported by Muhammad Azham Marwan